Supreme Court, U.S.
FILED
OCT 15 2014
OFFICE OF THE CLERK

No. 14-46, -47, -49

In the Supreme Court of the United States

MICHIGAN, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

NATIONAL MINING ASSOCIATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Clean Air Act Section 112(n)(1)(A) directs the Environmental Protection Agency (EPA) to regulate hazardous air pollutants from power plants if "appropriate and necessary" after studying public health hazards; the required study and other scientific data confirmed that power plant hazardous air pollution presents a serious risk to public health, and Congress omitted any reference to costs in Section 112(n)(1)(A), although Congress expressly told EPA to consider costs in taking other actions required by Section 112. The question presented is:

Whether EPA permissibly declined to consider the costs of regulation when it made its threshold determination to regulate hazardous air pollutants from power plants.

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INTRODUCTION

Over two decades ago, Congress amended Section 112 of the Clean Air Act and directed EPA to establish standards to limit hazardous air pollutants emitted by fossil-fueled power plants if EPA determined, after studying the public health hazards of those emissions, that it was "appropriate and necessary" to do so. In 2000, EPA made that determination based on an extensive record reflecting over a decade of research, including peer-reviewed scientific studies and actual power plant emissions data. EPA reaffirmed that finding, citing additional evidence, when it subsequently promulgated the Mercury and Air Toxics Standards (MATS) Rule in 2012 to protect public health and the environment.

By 2015, the MATS Rule will reduce power plant mercury emissions by seventy-five percent, fine particulate matter emissions (to which other toxic metals adhere) by nineteen percent, and acid gas emissions by eighty-eight percent. 77 Fed. Reg. 9,304, 9,424 (Feb. 16, 2012). These nationally-applicable reductions have been long-awaited by the undersigned states and local governments to stem the cross-border movement of toxins that are emitted by power plants in other states and that harm our residents and natural resources. For example, more than 10,000 inland waterbodies and over 46,000 river miles in the Northeast are impaired for fish consumption primarily due to atmospheric deposition of mercury, a problem

that will not be solved until out-of-state emissions are controlled.[1]

None of Petitioners' claims regarding the MATS Rule warrants this Court's review. EPA made the reasonable decision to base its threshold determination whether to regulate on the public health and environmental harms posed by hazardous air pollution emitted by power plants and not to focus on costs when making that threshold determination. The D.C. Circuit's decision upholding the MATS Rule was based on a careful analysis of the relevant text, structure, and context of Section 112, is consistent with this Court's precedent, and involves interpretation of a singular provision of Section 112 that has no recurring significance as it will be applied only this one time.

Petitioners wrongly claim that regulation of the Nation's largest source of toxic air emissions will provide "virtually no benefit" to public health, Pet. of the Nat'l Mining Ass'n. (NMA Pet.) at 15, while unduly burdening the utility industry and electricity consumers, *see, e.g.*, Pet. of the Utility Air Regulatory Group (UARG Pet.) at 33-34; Pet. of the State of Michigan, *et al.*, at 11-12 (Michigan Pet.). Not only do Petitioners grossly understate the benefits identified by EPA as part of its separate regulatory impact analysis, they also fail to account for the experience of the states that have already successfully promulgated mercury emission standards *more* stringent than the MATS

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[1] *See* Regional Mercury Total Maximum Daily Load, at vi, 44 (2007) (Northeast TMDL) *available at* http://www.epa.gov/region1/eco/tmdl/pdfs/ne/Northeast-Regional-Mercury-TMDL.pdf (last visited Oct. 8, 2014).

Rule. Power plants in those states have been able to comply with such standards—demonstrating that, as a practical matter, the MATS Rule is achievable using commercially available, cost-effective control technologies and without sacrificing electric system reliability.

The petitions should be denied.

STATEMENT

Since 1970, Congress has sought to reduce hazardous air pollutant emissions. *See* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1685 (1970). In 1990, in large part due to EPA's failure to regulate more than a handful of these toxic pollutants over nearly two decades, Congress extensively revised the Clean Air Act's hazardous air pollutant provision, Section 112. *See* S. REP. NO. 101-228, at 128, 131 (1989). Congress identified 189 hazardous air pollutants that EPA must regulate. 42 U.S.C. § 7412(b)(1). Congress then gave EPA one year to list all categories of sources emitting more than a specified quantity of those pollutants. *Id.* § 7412(c)(1). Congress required EPA to set emission limits based on what is commonly referred to as the "maximum achievable control technology" (MACT) standard, with minimum or "floor" standards for existing sources based upon the emission levels achieved by the best-performing twelve percent of sources in a source category. *Id.* § 7412(d)(3)(A)-(B) (a standard that, by definition, reflects cost considerations since it is based on the presumably cost-effective performance of actual units). Congress also required EPA to set, where achievable, a more stringent "beyond-the-floor"

standard, after consideration of costs and other factors. *Id.* § 7412(d)(2).

At the time of the 1990 amendments, Congress recognized power plants were a significant source of hazardous air pollutants, including mercury.[2] Congress required EPA to study the public health hazards "reasonably anticipated to occur" from hazardous air pollutants emitted by power plants "after imposition of" the other requirements of the Act, and mandated EPA to regulate if EPA determined it was "appropriate and necessary" to do so:

> [t]he Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate [power plants] under this section, if the Administrator finds such regulation is appropriate and necessary after considering the

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[2] *See* S. REP. NO. 101-228, at 131, 154 (1989); 1 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 871-72 (1993) (statement of Sen. Durenberger).

> results of the study required by this subparagraph.

42 U.S.C. § 7412(n)(1)(A).[3] This provision effectively provided power plants with "a three-year pass," while EPA conducted the study required by Section 112(n)(1)(A) (Utility Study) and evaluated whether it was "appropriate and necessary" to regulate them under Section 112. NMA Pet. App. at 25a.

Despite Congress's intent to address the public health threat posed by power plant hazardous air pollution, it was not until 2000, ten years after the 1990 amendments and seven years after Congress's deadline for EPA to have finalized the Utility Study, that EPA made the determination that it was "appropriate and necessary" to list power plants as a source category. 65 Fed. Reg. 79,825, 79,831 (Dec. 20, 2000). EPA made this threshold determination based on the Utility Study, which confirmed the adverse public health effects associated with power plants' hazardous air pollution. *Id.* at 79,826. Specifically, EPA cited contamination of U.S. waterbodies and fish with mercury—a potent neurotoxin, which, when ingested, can cause serious and long-lasting neurological problems, especially in children exposed in utero—as well as the potential carcinogenic effects of certain non-mercury metals emissions and potential

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[3] This provision addressed questions raised by some members regarding the effect of the Title IV acid rain program pollution controls, also added in 1990, on power plant hazardous air pollutant emissions, *see* 1 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, *supra* note 2, at 871-72 (statement of Sen. Durenberger), a program that had been implemented by the time EPA issued the 2012 MATS Rule.

concerns related to acid gas emissions. *Id.* at 79,827, 79,829, 79,830. In addition to the Utility Study, EPA considered the multi-source mercury study required by Section 112(n)(1)(B) and two other congressionally-mandated studies performed by the National Institute of Environmental Health Sciences and the National Academy of Sciences showing risks to public health, including sensitive populations, of consuming mercury-contaminated fish. *See* 77 Fed. Reg. at 9,307; 76 Fed. Reg. 24,976, 24,982 (May 3, 2011); 65 Fed. Reg. at 79,826.

With regard to mercury, EPA found that sixty percent of all mercury deposited in the U.S. came from domestic anthropogenic air emissions and that power plants contributed, at that time, nearly one-third of those emissions.[4] 65 Fed. Reg. at 79,827. EPA also noted that large numbers of Americans ate fish regularly, *id.* at 79,829, that forty states had imposed fish consumption advisories based on mercury contamination, *id.* at 79,827, and that many women of childbearing age were already exposed to dangerous levels of methylmercury, *id.* at 79,829-30. Specifically, EPA estimated that seven percent of women of child-bearing age were exposed to methylmercury at a level capable of causing adverse effects in a developing fetus and one percent of those women were exposed to three to four times that level. *Id.* at 79,829-30.

In 2005, however, EPA reversed course. It purported to remove power plants from the Section 112

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[4] In its 2011 proposal of the MATS Rule, EPA noted that power plants' 1999 share had risen to forty-three percent based on updated emissions data. 76 Fed. Reg. at 25,002, n.57.

list of source categories and, instead, to regulate existing power plant mercury emissions under Clean Air Act Section 111(d). 70 Fed. Reg. 15,994, 16,032 (Mar. 29, 2005). Many of the undersigned states and local governments challenged those actions as unlawful under the statute and likely to result in significantly greater emissions of mercury than a rule issued under Section 112. In 2008, the D.C. Circuit vacated EPA's delisting of power plants because EPA had failed to comply with Section 112(c)(9), which specifically prohibits EPA from removing listed sources unless it finds that the emissions from no individual source in the category will "exceed a level which is adequate to protect public health with an ample margin of safety" or result in any "adverse environmental effect." 42 U.S.C. § 7412(c)(9)(B)(ii); *New Jersey v. EPA*, 517 F.3d 574, 582-83 (D.C. Cir. 2008). EPA made no such findings, *New Jersey*, 517 F.3d at 583, and indeed it could not have made them, given the significant health and environmental risks posed by power plant emissions.

In 2012, EPA reaffirmed its 2000 listing determination and issued the MATS Rule. *See* 77 Fed. Reg. at 9,310-11, 9,366-76. By that time, all fifty states had established fish consumption advisories related to mercury contamination and many states had moved forward to control mercury emissions within their own borders, including by enacting rigorous mercury emission limits on power plants. *See* EPA, *2011 National Listing of Fish Advisories*, at 4-6, EPA-820-F-

13-058 (2013);[5] Nat'l Ass'n of Clean Air Agencies, Cmts., Proposed MATS Rule (2011) (NACAA Cmts.), Attach. 1.[6] In addition, to address widespread mercury surface water contamination, seven northeastern states began to implement a regional mercury "total maximum daily load," pursuant to the Clean Water Act, 33 U.S.C. § 1313(d)(1) (requiring development of total maximum daily loads for impaired waters). State regulations standing alone, however, have proven ineffective in addressing the cross-border impacts of power plant mercury emissions. *See* Northeast TMDL, *supra* note 1, at 44 (concluding that EPA action to "implement significant reductions from upwind out-of-region sources, primarily coal-fired power plants" would be necessary to return fish methylmercury concentrations to safe levels).

In its 2012 determination, EPA explicitly confirmed its 2000 finding that regulation of power plants was "appropriate and necessary" based on the record before it in 2000, as well as on additional technical analyses. 77 Fed. Reg. at 9,310-11, 9,362-64. In particular, EPA completed a peer-reviewed national-scale mercury risk assessment focused on those populations that eat a large amount of self-caught, freshwater fish. *Id.* at 9,311, 9,365-66. That study showed that twenty-nine percent of the 3,140 modeled watersheds have populations at risk of exceeding safe mercury levels

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[5] *Available at* http://water.epa.gov/scitech/swguidance/fishshellfish/fishadvisories/loader.cfm?csModule=security/getfile&PageID=685927 (last visited Oct. 8, 2014).

[6] *Available at* http://www.regulations.gov (search for "EPA-HQ-OAR-2009-0234-17620").

due, in part, to mercury emissions from power plants. *Id.* at 9,311, 9,339, 9,362, 9,366. Further, in ten percent of the watersheds studied, power plant emissions alone lead to exceedances of safe mercury levels, a condition EPA found "unacceptable." *Id.* at 9363, 9366. EPA also completed a peer-reviewed inhalation study that found that emissions of nickel and chromium from six of sixteen modeled power plants would pose lifetime cancer risks exceeding the benchmark level for delisting sources of carcinogenic hazardous air pollutants under Section 112(c)(9)(B)(i). *Id.* at 9,319.

Moreover, EPA found that power plants remained one of the Nation's most significant sources of hazardous air pollutants and the largest single source of anthropogenic mercury emissions—having increased their share to fifty percent of total U.S. mercury emissions in 2005. *Id.* at 9,310. Indeed, in the absence of the MATS Rule, EPA projects power plants will emit nearly six times more mercury than the next largest source category by 2016, even after application of other control programs required by the Clean Air Act. 76 Fed. Reg. at 24,976, 25,002, Table 3 (May 3, 2011).[7] Power plants' proportional share of the Nation's mercury emissions has grown as other sources have been required to limit their mercury emissions by complying with MACT standards set by EPA under

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[7] In its final rule, EPA revised downward the projected power plant mercury emissions from 29 tons to 27 tons based on additional reductions in mercury emissions from the Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011). 77 Fed. Reg. at 9,338.

Section 112.[8] Power plants are also a significant source of many other hazardous metals and the Nation's largest source of acid gases, which can cause chronic and acute respiratory damage, especially in children, and contribute to the acidification of our Nation's waterbodies. 77 Fed. Reg. at 9,310, 9,363; 76 Fed. Reg. at 25,004, 25,005, Table 4, 25,006, Table 5, 25,013, 25,016.

In light of that record, EPA concluded that it was "appropriate and necessary" to regulate power plants based on the public health and environmental hazards posed by their emissions of mercury and other hazardous air pollutants, and it promulgated MACT standards for power plant emissions of those pollutants. *See* 77 Fed. Reg. at 9,310-11, 9,367-71. In reaching that conclusion, EPA reasonably found it would not be appropriate to consider costs at the point of its threshold determination "whether to regulate [power plants] under section 112" because, among other things, "there is nothing in [Section 112(n)(1)(A)] that compels EPA to consider costs." 77 Fed. Reg. at 9,327.

Numerous parties, including Petitioners, challenged EPA's interpretation and application of the terms "appropriate" and "necessary" and its decision to

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[8] *See id.;* 75 Fed. Reg. 15,608 (Mar. 21, 2011) (industrial, commercial, institutional boilers, and process heaters); 76 Fed. Reg. 9,450 (Feb. 17, 2011) (gold mine ore processing and production); 73 Fed. Reg. 226 (Jan. 2, 2008) (iron and steel foundries); 72 Fed. Reg. 74,088 (Dec. 28, 2007) (electric arc furnace steelmaking facilities); 71 Fed. Reg. 76,518 (Dec. 20, 2006) (Portland cement manufacturing industry); 70 Fed. Reg. 59,402 (Oct. 12, 2005) (hazardous waste combustors); 68 Fed. Reg. 7,928 (Dec. 19, 2003) (mercury cell chlor-alkali plants).

regulate power plants using MACT standards. On April 15, 2014, in a per curiam opinion, the D.C. Circuit upheld the MATS Rule, dismissed one petition, and denied all of the remaining petitions. Judge Kavanaugh dissented, in part, opining that EPA should have considered costs when deciding whether to regulate power plants under Section 112.

REASONS FOR DENYING THE PETITIONS

The D.C. Circuit correctly afforded *Chevron* deference to EPA's reasonable interpretation that it was not required to consider costs for purposes of its threshold determination whether to regulate power plant hazardous air pollution under Section 112(n)(1)(A). That decision is fully consistent with this Court's precedent. The plain language of Section 112(n)(1)(A), statutory context, and legislative history demonstrate that Congress intended EPA to regulate hazardous air pollutants emitted by power plants under Section 112 if EPA found it was "appropriate and necessary" to do so based on the Utility Study and taking into account the effect of other Clean Air Act provisions on controlling that pollution. The D.C. Circuit correctly found that Congress included no requirement to consider costs in Section 112(n)(1)(A) and that EPA's decision not to consider costs in determining whether to regulate power plants under Section 112 was a permissible one.

Further, Section 112(n)(1)(A) concerns a one-time determination by EPA whether to regulate hazardous air pollution from power plants. The "appropriate and necessary" standard provided by Congress to guide EPA's determination applies to no other EPA determinations under the Clean Air Act, and the

decision below is therefore one of limited applicability. That decision neither precludes EPA from nor requires EPA to consider costs in any other Clean Air Act rulemaking, but rather properly resolves the question whether costs must be considered in this particular rulemaking on the basis of the unique statutory language in Section 112(n)(1)(A) and the relevant statutory history and context.

Finally, no practical concerns warrant this Court's review. Several states have implemented mercury control standards more rigorous than those set forth in the MATS Rule, demonstrating that the Rule's emissions reduction requirements are achievable, cost-effective control technologies are available, and compliance with such standards causes no adverse effects on electric system reliability.

I. The D.C. Circuit's Ruling That EPA Was Not Required to Consider Costs in Making Its Threshold Determination Whether to Regulate Hazardous Air Pollutants from Power Plants Under Section 112 of the Act Is Fully Consistent With this Court's Precedent.

The D.C. Circuit's ruling that EPA permissibly chose not to consider costs for purposes of its threshold determination whether to regulate hazardous air pollutants emitted by power plants falls squarely within this Court's precedent. *See, e.g.*, *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 467-71 (2001) (affirming EPA decision not to consider costs when setting National Ambient Air Quality Standards (NAAQS) where statute did not expressly require costs to be considered); *Entergy Corp. v.*

Riverkeeper, Inc., 556 U.S. 208, 217-18 (2009) (EPA's interpretation that the Clean Water Act's "best technology available" standard permits consideration of a technology's costs "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts") (emphasis in original); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603, 1610 (2014) (affording *Chevron* deference to EPA's "reasonable interpretation of ambiguous statutory language," and upholding EPA's determination to take the cost of pollution reduction into account for purposes of allocating among upwind states obligations to reduce pollution under the Clean Air Act's Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i)).

Here, applying *Chevron*, the only question is whether EPA's interpretation of Section 112(n)(1)(A) as not requiring it to consider costs is reasonable, and the D.C. Circuit correctly held that it is. The D.C. Circuit's decision does not preclude EPA from considering costs in any other Clean Air Act rulemaking; rather, by closely analyzing the statutory text and the context in which the 1990 amendments were enacted, it rightly follows *Whitman*, *see Entergy Corp.*, 556 U.S. at 223 (noting that in *Whitman*, taken in context, statutory silence was best interpreted as limiting agency discretion), *Entergy Corp.*, *see id.* at 222 (taken in context, statutory silence "meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree"), and *EME Homer City*, 134 S. Ct. 1584, 1607 (2014) ("[l]acking a dispositive statutory instruction to guide it, EPA's decision, we conclude, is

a 'reasonable' way of filling the 'gap left open by Congress.'"). The decision creates no new bright line or any rule regarding when costs may be considered by EPA for purposes of Clean Air Act rulemaking, and it cannot, since such questions turn on interpretations of specific statutory language, and where appropriate, legislative history and other record facts that shine light on congressional intent and the reasonableness of the agency interpretation. *See Entergy Corp.*, 556 U.S. at 222 ("under *Chevron*, that an agency is not *required* to [consider costs] does not mean that an agency is not *permitted* to do so.") (emphasis in original).

In *Whitman*, this Court denied a similar attempt to overturn EPA's decision not to consider the costs of implementation when setting NAAQS for the protection of public health and welfare under Section 109 of the Clean Air Act. 531 U.S. at 464-471. In rejecting the industry respondents' interpretation of the provision as allowing for consideration of costs, Justice Scalia noted numerous provisions where, in contrast to Section 109, Congress expressly authorized cost consideration, stating "[w]e have therefore refused to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id.* at 467. Because respondents failed to show a clear "textual commitment of authority to the EPA to consider costs in setting NAAQS under § 109(b)(1)," *id.* at 468, "[t]he text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the [Clean Air Act] as a whole, unambiguously bar[red] cost considerations from the NAAQS-setting process." *Id.* at 471.

Although, as the D.C. Circuit noted, the language of Section 109 differs from the language of Section 112 at issue here, *Whitman* teaches that the interpretation of "appropriate and necessary" is context-dependent. Looking to the surrounding words, the language of the entire provision, and the "statutory and historical context," EPA's decision not to consider costs for purposes of its "appropriate and necessary" determination was reasonable. *Id.* at 471; *see also Entergy Corp.*, 556 U.S. at 217-22; 223.

First, the plain language of Section 112(n)(1)(A), which nowhere mentions costs, leaves no doubt that Congress intended EPA's consideration of "hazards to public health" in the Utility Study to be the touchstone informing its decision whether it was "appropriate and necessary" to regulate power plant hazardous air pollutant emissions. Congress was aware of the public health impacts of these highly toxic emissions and granted broad authority to EPA in the 1990 Amendments to undertake whatever action was "appropriate and necessary," based on the results of the Utility Study, to control those emissions to the extent they would not be controlled under other Clean Air Act provisions, regardless of cost.[9] As the D.C. Circuit

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[9] Petitioners' attempt to invoke this Court's recent decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) for the proposition that EPA does not have the "power to revise clear statutory terms," UARG Pet. at 27, misses the mark. There, EPA sought to change the statutory thresholds for triggering permitting requirements under the Act's Prevention of Significant Deterioration and Title V programs to address the substantial practical implementation problems that would have made it nearly impossible to apply the statute's relatively low tonnage thresholds to greenhouses gases. *Utility Air Regulatory Grp.*, 134 S. Ct. at

observed, Section 112(c)(9), governing delisting of hazardous air pollutant source categories, provides further support for EPA's interpretation. *See* 42 U.S.C. § 7412(c)(9); NMA Pet. App. at 31a. The plain language of that provision requiring EPA to consider public health and environmental effects—not costs—when making a delisting determination, *id.*, further evidences Congress's intent that costs should not be a focus of EPA's decision whether to list or delist source categories.

Second, reading Section 112 as a whole, it is clear that "Congress mentioned costs explicitly where it intended EPA to consider them," including in subparagraph 112(n)(1)(B), which immediately follows Section 112(n)(1)(A). *See* NMA Pet. App. at 24a (citing provisions of Section 112 where costs are mentioned expressly). Further, in contrast to Petitioners' reading, EPA's decisions to consider costs in deciding the extent of required pollution reductions from upwind states under the Clean Air Act, as in *EME Homer City*, or of setting national performance standards for cooling water intake structures at power plants under the Clean Water Act, as in *Entergy Corp.*, are materially different than EPA's decision at issue here—whether to regulate hazardous air pollutants from power plants *at all*. Given that Congress did not require EPA to consider costs in making the threshold determination

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2437-38, 2442-44. Unlike the statutory provision at issue in *Utility Air Regulatory Group*, Section 112(n)(1)(A) was specifically crafted by Congress to address hazardous air pollution from power plants and EPA's interpretation not to read a cost requirement into its decision whether to regulate does nothing to change any aspect of the express statutory language of Section 112.

whether to regulate power plant hazardous air pollution under Section 112(n)(1)(A), exercising its discretion to consider costs in determining the extent of regulation, but not in determining whether to regulate, is a reasonable choice for EPA to make, and consistent with the overall statutory framework of Section 112. *See supra* at pp. 3-4; 42 U.S.C. § 7412(d)(2) (requiring EPA to consider costs for purposes of beyond-the-floor standard setting for hazardous air pollutant control).

Third, Section 112(n)(1)(A) addresses hazardous air pollution. As the D.C. Circuit noted, EPA's interpretation of "appropriate and necessary" is reasonable in light of the purpose of the 1990 Amendments, "which were aimed at remedying 'the slow pace of EPA's regulation of [hazardous air pollutants] following the initial passage of the [Clean Air Act].'" NMA Pet. App. at 26a (citing *New Jersey*, 517 F.3d at 578). The statutory and historical context confirm the reasonableness of EPA's interpretation of Section 112(n)(1)(A)—focusing on public health impacts, not costs, at the threshold point of determining whether to regulate—and the absence of any conflict with this Court's precedent.

Nevertheless, citing *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014), Petitioners urge this Court to adopt a new exception to *Chevron* that affords less deference to agencies in cases involving "critical impacts on American industry," UARG Pet. at 33, 35, and substantial regulatory costs, *see* NMA Pet. at 15-16, 22 (questioning EPA's exercise of discretion in connection with adoption of "massively costly regulations for virtually no return"). Petitioner UARG

asks this Court to inject a judge-made cost-benefit analysis requirement into agency rulemaking wherever Congress has not expressly precluded cost considerations, *see* UARG Pet. at 30—a result that would subvert Congressional intent and raise significant separation of powers concerns. Such a new standard of review for agency rulemaking would significantly diminish agency discretion; in instances where Congress has not clearly precluded cost considerations, agency rulemaking to implement a regulatory statute that does not make cost consideration a central factor would be deemed unreasonable *per se*. *See id.* Setting aside Petitioners' inaccurate characterization of EPA's regulatory impacts analysis of the costs and benefits of the MATS Rule, neither this Court's precedent, nor that of any court of appeals, recognizes any less deferential standard of review for agency action that involves costly regulation.

Finally, Petitioners' argument that Congress could not have intended for EPA to regulate power plants under Section 112 without giving any consideration to costs rests on a "false premise," as the D.C. Circuit found. NMA Pet. App. at 27a. Petitioners' characterization of the decision below as "authorizing the Agency to ignore the costs of its regulations," NMA Pet. at 6, is simply inaccurate. Noting that Congress expressly required EPA to take costs into account for beyond-the-floor standards, the D.C. Circuit held that "[h]ere, as in *Whitman*, interpreting one isolated provision not to require cost consideration does not indicate that Congress was unconcerned with costs altogether, because Congress accounted for costs elsewhere in the statute." NMA Pet. App. at 27a. The

D.C. Circuit correctly observed, as well, that, as a practical matter, "even for MACT floors, costs are reflected to some extent because floors correspond (by definition) to standards that better-performing [power plants] have *already achieved*, presumably in a cost efficient manner." *Id.* (emphasis in original).

Petitioners' proper recourse lies with Congress, not this Court. EPA permissibly concluded that, in determining whether regulation is "appropriate and necessary," it should focus its attention on factors relating to public health hazards, and not industry's objections that emissions controls are costly, properly putting "the horse before the cart, and not the other way around." *Id.* at 29a.

II. EPA's Interpretation of Section 112(n)(1)(A) Has No Precedential Importance Because the Provision Applies Only to the Agency's Threshold Determination to Regulate Power Plant Hazardous Air Pollution.

This case does not have the "enormous precedential importance for administrative law" alleged by Petitioner NMA, NMA Pet. at 6, for the simple reason that the statutory language in question applies only to EPA's threshold decision to regulate power plant hazardous air pollution, and to no other decision. The "appropriate and necessary" standard is unique to Section 112's treatment of power plants, and does not apply to EPA's regulation of other sources of hazardous air pollutants under Section 112, or any other type of air pollutant emitted by power plants or any other source.

As Petitioners recognize, Section 112(n)(1)(A) was included in the 1990 Clean Air Act amendments specifically and exclusively to address power plant hazardous air pollutant emissions. *See* Michigan Pet. at 3 ("Congress has chosen to treat certain sources of hazardous air pollutants differently than others."); *id.* at 4 ("Congress has chosen to treat [power plants] very differently from other major sources."); UARG Pet. at 8 ("Congress in 42 U.S.C. § 7412(n)(1)(A) required that EPA treat [power plants] differently from every other source category regulated under § 7412"); NMA Pet. at 7 ("Congress treated electric generators differently from other source categories of [hazardous air pollutant] emissions").

Petitioners' own repeated assertion that Section 112(n)(1)(A) treated power plants "very differently" belies their argument that the decision below will open the floodgates to unbridled "executive branch lawmaking." UARG Pet. at 26. Far from constituting a sea change in administrative law, because of the highly specific nature of the legislation, and the particular facts and long history surrounding Clean Air Act regulation of power plant pollution, the decision below is one of limited applicability. This is a straightforward administrative law case involving the interpretation of a single provision of the Clean Air Act—Section 112(n)(1)(A)—that will apply once, to one class of pollutants—hazardous air pollutants—and one source category—power plants. The D.C. Circuit properly applied this Court's *Chevron* analysis to support its holding that EPA's interpretation of that unique provision—as not requiring EPA to consider costs for purposes of its "appropriate and necessary"

determination—constituted a reasonable exercise of its agency discretion.

III. States' Experience Shows That, as a Practical Matter, the MATS Rule Is Achievable, Cost-Effective Control Technologies Are Readily Available, and There Is No Real-World Impediment to Compliance.

Petitioners' contention that the MATS Rule will impose unreasonable burdens on industry or electricity consumers, *see, e.g.*, Michigan Pet. at 11-12, 18; UARG Pet. at 33-34, is contradicted by states' experience to date. Power plants in several states already comply with standards that are equally stringent as or even more stringent than the MATS Rule, using long-established technologies, and they have done so without sacrificing electric system reliability. Indeed, it is the actual performance of power plants employing economically viable controls—such as those located in states with already established hazardous air pollutant standards—that EPA relied on in setting the MACT floor standard in the MATS Rule, as required by Section 112(d)(3).

Commenting in 2011 on EPA's proposed standards, Petitioner Michigan's Department of Environmental Quality (DEQ) represented that, with respect to Michigan's coal-fired units, "[w]ith the right combination of emission controls, the proposed mercury emission limit is achievable by existing Michigan units." Michigan DEQ, Comments, Proposed MATS Rule (2011) (Michigan Cmts.), at 2, *available at* http://www.regulations.gov (search for "EPA-HQ-OAR-

2009-0234-18426").[10, 11] Michigan DEQ cited a number of available pollution control technologies, including fabric filter baghouses and wet and/or dry scrubber systems, then being installed on Michigan power plants, which "can be used to meet the proposed mercury emission limit." *Id.*

Michigan did not raise any concerns with respect to either the cost of mercury control technology for existing power plants or impacts on electric system reliability in connection with compliance with the 2011 proposed rule (Proposed Rule). Indeed, as Michigan DEQ noted, the Michigan Public Service Commission, along with "a stakeholder workgroup consisting of industry, environmental groups, and government agencies" participated in the "intense rulemaking process" that led to the development of Michigan's own standard, which, at that time, required as one of three compliance options a "minimum of 90% reduction from baseline input mercury levels or an output-based mercury emission standard of 0.008 [lb/GW-hr]" for

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[10] Notably, EPA's 2011 proposed standards were more stringent than the limits adopted by EPA in the Final Rule. *Compare* 76 Fed. Reg. at 25,027, Table 10 (proposing in 2011, 0.008 lb per gigawatt-hour (lb/GW-hr) or 1.0 lb per trillion British thermal units (lb/TBtu)), *with* 77 Fed. Reg. at 9,367, Table 3 (adopting in 2012, 0.013 lb/GWh or 1.2 lb/TBtu).

[11] In fact, in its comments, Michigan voiced concern that the then-proposed EPA mercury emission limit of 0.040 lb/GWh for a subcategory of coal-fired power plants designed to burn low rank virgin coal was not stringent enough given, among other things, the serious public health concerns associated with mercury emissions and the ready availability of control technology. Michigan Cmts., *supra*, at 2.

existing coal-fired power plants. *Id.* at 2-3 (internal citations omitted); *see also* MICH. ADMIN. CODE r. 336.2503(1)(a)-(b) (2009).[12]

At least fourteen other states across the Nation have enacted controls on power plant mercury emissions, most of which are currently in effect.[13] Nearly every state that has set a rate-based standard has imposed one more stringent than the MATS Rule, and several state standards are twice as stringent as the MATS Rule mercury standard of 1.2 lb/TBtu or

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[12] In 2013, Michigan amended its regulations, which required mercury controls by 2015, to exempt power plants subject to the MATS Rule, and provided that the regulation as a whole will be automatically repealed once there is "a final judgment or order from which no further appeal or review is taken or available in *White Stallion v[.] EPA*, No. 12-1100 (D.C. Circuit) upholding the provisions of the [MATS Rule] relative to emissions of mercury." MICH. ADMIN. CODE r. 336.2502a.

[13] *See* 5 COLO. CODE REGS. § 1001-8:B.VIII (compliance with first phase required by Jan. 1. 2012); CONN. GEN. STAT. § 22a-199 (compliance required by Jul. 1, 2008); DEL. ADMIN. CODE, tit. 7, § 1146-6 (compliance with first phase required by Jan. 1, 2009); ILL. ADMIN. CODE tit. 35, § 225.230 (compliance required by Jul. 1, 2009); MD. REGS. CODE tit. 26, § 11.27.03.D (compliance with first phase required by Jan. 1, 2010); MASS. REGS. CODE tit. 310, § 7.29 (compliance with first phase required by Jan. 1, 2008); MINN. R. 7011.0561 (compliance with first phase required by Jan. 1, 2018); MONT. ADMIN. R. 17.8.771 (compliance required by Jan. 1, 2010); N.H. REV. STAT. ANN. § 125-O:11-18 (compliance required by Jul. 1, 2013); N.J. ADMIN. CODE § 7:27-27.7 (compliance required by Dec. 15, 2007); N.Y. COMP. CODES R. & REGS. tit. 6, § 246.6 (compliance with first phase required by Jan. 1, 2010); 15A N.C. ADMIN. CODE 2D.2511 (compliance required by Dec. 31, 2017); OR. ADMIN. R. 340-228-0606 (compliance required by Jul. 1, 2012); WIS. ADMIN. CODE NR § 446.13 (compliance required by Apr. 16, 2016).

0.013 lb/GWh, *see* 77 Fed. Reg. at 9,367, Table 3.[14] Compliance with Connecticut, Massachusetts, and New Jersey's standards was required three to four years prior to EPA's 2011 proposal of the MATS Rule. By that time, the affected power plants within those states had timely and consistently met the mercury limits with control technologies widely used throughout the industry, and with no adverse effects on electric system reliability.[15]

Similarly, the experience of the states in implementing reductions in sulfur dioxide and nitrogen oxides required by EPA's 2005 Clean Air Interstate

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[14] *See* CONN. GEN. STAT. § 22a-199(b)(1) (0.6 lb/TBtu); DEL. ADMIN. CODE, tit. 7, § 1146-6.2 (0.6 lb/TBtu); ILL. ADMIN. CODE tit. 35, § 225.230(a) (0.008 lb/GW-hr); MASS. REGS. CODE tit. 310, § 7.29(5)(a)(3)(f) (0.0025 lb/GW-hr); MINN. R. 7011.0561 (0.8 lb/TBtu); N.J. ADMIN. CODE § 7:27-27.7(a) (3.00 mg/MWh (equivalent to 0.66 lb/TBtu)); N.Y. COMP. CODES R. & REGS. tit. 6, § 246.6(a) (0.6 lb/TBtu); OR. ADMIN. R. 340-228-0606(1) (0.6 lb/TBtu); WIS. ADMIN. CODE NR § 446.13(1) (0.008 lb/GW-hr).

[15] *See* Connecticut Dep't of Energy & Envtl. Protection, Comments, Proposed MATS Rule (2011), Technical Cmts. (Connecticut Cmts.), at 1-2, *available at* http://www.regulations.gov (search for "EPA-HQ-OAR-2009-0234-16513"); Massachusetts Dep't of Envtl. Protection, Comments, Proposed MATS Rule (2011) (Massachusetts Cmts.), at 7, *available at* http://www.regulations.gov (search for "EPA-HQ-OAR-2009-0234-18039"); New Jersey Dep't of Envtl. Protection, Comments, Proposed MATS Rule (2011) (New Jersey Cmts.), at 1, 5, *available at* http://www.regulations.gov (search for "EPA-HQ-OAR-2009-0234-18444"); NACAA Cmts., *supra* note 6, at 7; Northeast States for Coordinated Air Use Management, Comments, Proposed MATS Rule (2011) (NESCAUM Cmts.), at 5-8, *available at* http://www.regulations.gov (search for "EPA-HQ-OAR-2009-0234-17843").

Rule[16] and 1998 NOx SIP Call, 63 Fed. Reg. 57,356 (Oct. 27. 1998), demonstrates that the MATS Rule can timely be implemented without disrupting electric system reliability. NACAA Cmts., *supra* note 6, at 7. Compliance with those separate rules has involved installation of control technologies similar to those that will be used to meet the mercury and acid gas limits required under the MATS Rule. *Id.*

For these reasons, several states—like Michigan—reported in their comments on the Proposed Rule that the coal-fired power plants within their borders would be able to meet the proposed mercury standard with technologies already in place.[17] Further, the National Association of Clean Air Agencies (NACAA), and several individual states, urged EPA to go further, advocating for a lower mercury limit in their comments on the Proposed Rule.[18] NACAA

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[16] The Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005), was initially vacated by *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008), but left in place on rehearing, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008), and subsequently replaced by the Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), upheld by this Court in *EPA v. EME Homer City*, 134 S. Ct. 1584 (2014). Both rules require reductions in sulfur dioxide and nitrogen oxides emissions.

[17] Connecticut Cmts., *supra* note 15, at 1-2; Massachusetts Cmts., *supra* note 15, at 7; New Jersey Cmts., *supra* note 15, at 1; NESCAUM Cmts., *supra* note 15, at 8.

[18] Massachusetts Cmts., *supra* note 15, at 2, 7; NACAA Cmts., *supra* note 6, at 9; New Jersey Cmts., *supra* note 15, at 5; New York State Dep't of Envtl. Conservation, Comments, Proposed MATS Rule (2011), Cvr., at 2, *available at* http://www.regulations.gov (search for "EPA-HQ-OAR-2009-0234-17796").

similarly pressed for consideration of higher sulfur dioxide removal efficiencies in determining the MACT standard for acid gases. NACAA Cmts., *supra* note 6, at 9.

Petitioners' exaggerated claims of widespread adverse effects on industry and consumers are contradicted by the actual experience of several states that have already imposed standards at least as strict as the MATS Rule. Given the record of successful implementation of state standards more rigorous than the MATS Rule, as well as state implementation of other EPA rules requiring technological controls similar to those required by the Rule, no practical considerations warrant this Court's review.

CONCLUSION

The petitions for writs of certiorari should be denied.

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Dated: October 15, 2014

REPLY BRIEF

No. 14-49

IN THE

Supreme Court of the United States

NATIONAL MINING ASSOCIATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 29, 2014

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Reply

The National Mining Association ("NMA") respectfully submits this reply to the Brief for the Federal Respondents in Opposition ("Fed. Br.") and the other briefs[1] that were filed in response to NMA's Petition for Writ of Certiorari.

Several points are clear:

1. Although the Environmental Protection Agency ("EPA") and its supporters continue to highlight the asserted "co-benefits" of the rule in their briefs, they also concede that these benefits were legally irrelevant to EPA's determination that it was "appropriate and necessary" to regulate. *See, e.g.*, Fed. Br. at 12.[2]

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[1] Brief in Opposition by California, et al., Brief in Opposition of Respondents American Academy of Pediatrics, et al., Brief in Opposition of Respondents Calpine Corporation, et. al.

[2] The MATS Rule is not the only example of a rule where EPA has relied on co-benefits from reducing a pollutant already regulated under the NAAQS program. A review of the Regulatory Impact Analyses for 57 recent Clean Air Act rules showed that either all or the majority of the benefits on which EPA has relied for most of the 57 rules were PM2.5 co-benefits. Anne E. Smith, Ph.D., NERA Economic Consulting, An Evaluation of the PM2.5 Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations at 7-9 (Dec. 31, 2011), available at http://www.nera.com/publications/archive/2011/an-evaluation-of-the-pm25-health-benefits-estimates-in-regulato.html; see also Anne E. Smith, Ph.D., NERA Economic Consulting, Technical Comments on the Regulatory Impact Analysis Supporting EPA's Proposed Rule for Utility MACT and Revised NSPS at 20-21 (Aug. 3, 2011), Attachment 13 to UARG Comments on Proposed MATS Rule (Aug. 4, 2011), EPA-HQ-OAR-2009-0234-17785 (discussing problem of "double counting" PM2.5 co-benefits).

2. As EPA found, therefore, the total monetized benefits of the rule are $4-6 *million* per year and the total cost of the rule is $9.6 *billion* per year. 77 Fed. Reg. 9,304, 9,362 Feb. 16, 2012), Table 2, Pet. App. 208a.

3. EPA's statement that "it remains certain that the benefits of this rule * * * are substantial and far outweigh the costs," Fed. Br. at 13 (citing 77 Fed. Reg. at 9,306), refers to both the $4-6 million in direct benefits and to the legally irrelevant co-benefits. *See* 77 Fed. Reg. at 9,306, Pet. App., particularly Table 2 on that page and the paragraph immediately preceding the paragraph the Federal Respondents cite. EPA, therefore, did not conclude that the legally relevant benefits of the rule outweigh the costs. Far from it.

3. As to the four possible additional unquantifiable benefits that Federal Respondents cite, Fed. Br. at 12-13, the first three pertain to mercury. Of the benefits claimed in item (4) (reduced cancer risk and reduced water-body acidification), the only acid gas benefit is reduced acidification, since EPA has conceded that acid gases do not pose a cancer risk. 76 Fed. Reg. 24,976, 25,016 (May 3, 2011), Pet. App. 1161a, 1342a, 76 Fed. Reg. at 25,011-12, Pet. App. 1317a-1323a.

4. As to the possibility that electric generator acid gas emissions contribute to acidification of water bodies, (a) the record contains no evidence that these emissions are actually causing or exacerbating acidification, National Mining Association Petition for Writ of Certiorari ("NMA Pet.") at 23-25; (b) EPA's comprehensive study of the impacts of electric

generator emissions of hazardous air pollutants did not conclude that electric generator acid gas emissions created an acidification concern, *id.* at 24[3]; (c) EPA cited only one study to support its acidification claim, and this study examined emissions in the United Kingdom, 77 Fed. Reg. at 9,362, Pet. App. 457a-458a; and (d) in the end, EPA could assert no more than that "deposition of hydrochloric acid *could* exacerbate" existing water-body acidification, 76 Fed. Reg. at 25,050, Pet. App. 1482a-1483a (emphasis added).[4] The Federal Respondents and their allies do not dispute these facts.

4. Acid gases and other hazardous air pollutants emitted by electric generators are indeed hazardous. That is why Congress listed these substances under Section 7412(b). But Congress did not, by its listing action, command that EPA regulate electric generator hazardous air pollutant emissions. As Federal Respondents concede, Congress directed EPA to study the health hazards actually posed by these emissions—in other words, whether electric generators emit these substances in sufficient quantity as to create a health hazard—and then to regulate only if "appropriate and necessary." Fed. Br. at 5, 21. As indicated in item 3 above, EPA's Utility

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[3] *See* Brief in Opposition by California, et al. at 15 (Section 112(n)(1)(A) "leaves no doubt that Congress intended EPA's consideration of 'hazards to public health' in the Utility Study to be the touchstone informing its decision whether it was 'appropriate and necessary' to regulate power plant hazardous air pollutant emissions.").

[4] The reply brief of the Utility Air Regulatory Group in consolidated docket No. 14-47 will show that the asserted unquantifiable benefits of reducing electric generator emissions of mercury and non-mercury metals are equally flimsy.

Study found no health hazards from electric generator acid gas emissions, and the additional evidence EPA cited indicated, at best, only a generalized basis for health or environmental concern.

5. The pollution controls needed to reduce electric generator acid gas emissions drive much of the $9.6 billion annual overall cost of the regulation, 76 Fed. Reg. at 25,014, Pet. App. 1327a-1331a, a point Federal Respondents and their allies also do not dispute. Not coincidentally, these controls drive virtually all of the co-benefits that EPA supposedly did not rely on in promulgating the rule. NMA Pet. at 4 and 77 Fed. Reg. at 9,306, Table 2, n. b, Pet. App. 208a.

In 42 U.S.C. § 7412(n)(1)(a), Congress barred EPA from regulating electric generator emissions of hazardous air pollutants, including acid gas emissions, unless the agency first made a rational determination that regulation was "appropriate and necessary." NMA submits that no rational person would choose to spend $9.6 billion every year for $4-6 million in return plus some possible additional but unquantifiable benefit. NMA further submits that no rational person would choose to spend much of $9.6 billion every year for *no* quantifiable return in health or environmental benefit and only the flimsiest of potential non-quantifiable benefits.

The stark irrationality of EPA's decision—explainable only by EPA's desire to hijack Section 112(n)(a)(1) to reduce non-hazardous air pollutants—renders this case sufficiently important to justify granting NMA's petition. As this Court has said,

Congress can certainly authorize regulation no matter the cost. *Whitman v. American Trucking Associations*, 531 U.S. 457, 466 (2001). But the corrolary of this ruling is now in jeopardy: where Congress does not bar a regulator from considering costs—and instead authorizes only "appropriate and necessary" regulation—an agency cannot willfully blind itself to the enormous costs it will inflict on the American people.

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